IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-813

FRITHJOF O.M. WESTBY, individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, individually and as Director of the South Dakota Division of Social Welfare,

Appellants

v.

JANE DOE, on behalf of herself and all others similarly situated.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT

WILLIAM J. JANKLOW
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Pierre, South Dakota 57501

December, 1975

INDEX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
No.

FRITHJOF O.M. WESTBY, et al.,

Appellants

vs.

JANE DOE, et al.,

Appellees

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the United States District Court for the District of South Dakota, entered on September 29, 1975, invalidating a regulation of the South Dakota Department of Social Services and enjoining its enforcement so as to deny Plaintiff-Appellee medicaid benefits covering the cost of her abortion, and submit this Statement to show that the Supreme Court of the United States has jurisdiction on the appeal and that a substantial question is presented as to require plenary consideration.

OPINION BELOW

The opinion of the District Court of the District of South Dakota, Western Division is not reported. A copy of that opinion is attached hereto as Appendix A.

JURISDICTION

Appellees commenced this action seeking injunctive relief to enjoin officials of the South Dakota Department of Social Services from refusing to pay for voluntary abortions under the Medicaid Program, pursuant to title XIX of the Social Security Act of 1935, and all Acts supplementary and amendatory thereto, 42 U.S.C. §1396 *et. seq.* Pursuant to 28 U.S.C. §2281 *et. seq.* a three-judge district court was convened. A judgment favorable to appellee was entered by that court on September 24, 1974. Subsequently, Appellants filed a Notice of Appeal with that Court on October 3, 1974 giving notice of appeal to the United States Supreme Court pursuant to 28 U.S.C. §1253. That appeal was docketed in this Court on November 30, 1974 as No. 74-684. On March 17, 1975 the lower court's judgment was vacated and the case remanded to the United States District Court for the District of South Dakota for further consideration in light of *Hagans* v. *Lavine*, 415 U.S. 528, 543-545 (1974).

A second judgment favorable to Appellee was entered by the District Court on September 29, 1975. Appellants filed a Notice of Appeal with that Court on October 20, 1975, giving notice of this present appeal to the United States Supreme Court. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. §1253.

STATE LAW INVOLVED

Rule 28D.210 of the South Dakota Department of Social Services provides:

> Physician services not covered under the Medical Assistance Program are as follows:

> 1. Any items or services which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.

The above cited rule was adopted pursuant to South Dakota Compiled Laws Annotated §§28-6-1, 2 and 4 (1967), Vol. 9, pp. 362 and 363.

S.D.C.L. 28-6-1 (1967) provides:

> The State Department of Public Welfare is hereby authorized and empowered to provide medical or remedial care on behalf of persons having insufficient income and resources to meet the necessary cost thereof, in accordance with standards which the state public welfare commission shall adopt and provide pursuant to the provisions of title XIX of the 1965 amendments to the federal Social Security Act.

S.D.C.L. 28-6-2 (1967) provides:

> The State Public Welfare Commission shall adopt rules and regulations requiring state-wide operation of the plan adopted hereunder.

S.D.C.L. 26-6-4 (1967) provides:

> The amount, duration, and scope of medical or remedial care and services and the basis for and extent of vendor payments in behalf of any person under this chapter shall be established by rules and regulations of said Commission, and may include, at the discretion of the Commission, any or all individuals and services for which federal funds are available to the state department under the Social Security Act; provided however, that the rules and regulations and the implementation thereof shall be subject to the review of the Legislature.

QUESTION PRESENTED

Whether the appellants in administering the Medicaid Program under title XIX of the Social Security Act are required to pay the costs of Appellee's voluntary abortion.

STATEMENT OF THE CASE

Pursuant to Rule 28D.210 of the South Dakota Department of Social Services, the Division of Social Welfare in administering the Medicaid Program will pay for only therapeutic abortions.

Plaintiff Jane Doe became pregnant about the 18th day of January, 1974. She decided to have this pregnancy terminated by abortion. Being a qualified medicaid recipient, Plaintiff did on the 19th day of April, 1974, commence action against Appellants herein seeking injunctive relief to enjoin officials of the South Dakota Department of Social Services from not paying for elective abortions.

This action was brought pursuant to 42 U.S.C. §1983 with jurisdiction being conferred upon the District Court by 28 U.S.C. §1343 (3) and (4).

Pursuant to 28 U.S.C. §2281, a three-judge court was convened.

Subsequent to the filing of the complaint on April 19, 1974, the following motions, decisions, and appeal were made:

April 19, 1974

Plaintiff made motion for temporary restraining order, preliminary injunction, and to proceed as class action.

April 30, 1974

Defendant Woodard made motion to dismiss.

May 6, 1974

Defendant Woodard filed answer to Plaintiff's complaint.

Defendants made motion for appointment of guardian *ad litem* for the child concerned, as required by FRCP 17c, and to allow intervention of said guardian pursuant to FRCP 24 (a) (2).

Defendants moved to allow intervention of unknown father of child concerned as provided by FRCP 24 (a) (2).

May 7, 1974

Court entered order denying motion for appointment of guardian *ad litem*.

Court entered order denying motion for preliminary injunction.

Court entered order denying motion for intervention of unknown father.

Court entered a memorandum opinion stating, *inter alia:*

> It is the opinion of this Court that this Court is without jurisdiction to provide the interlocutory relief requested. This Court feels that this case is a proper one for a three-judge district court pursuant to 28 U.S.C. §2281 . . . This Court is today writing the Chief Judge of the Eighth Circuit Court of Appeals to request the empaneling of such a three-judge panel.

May 8, 1974

Plaintiff made application for interlocutory injunction before a three-judge Court.

May 9, 1974

Plaintiff made application for temporary restraining order.

District Judge Bogue entered order denying motion for temporary restraining order.

May 22, 1974

Order dated May 10 entered: Chief Circuit Judge Pat Mehaffy designated District Judge Paul Benson, and Circuit Judge Donald R. Ross to serve with District Judge Andrew Bogue to constitute the three-judge Court.

Defendant Westby enters Answer to Plaintiff's complaint.

May 31, 1974

Plaintiff enters motion for summary judgment.

June 19, 1974

Defendants make motion to dismiss.

Defendants make motion for Summary Judgment.

September 24, 1974

Three-judge Court entered MEMORANDUM OF DECISION AND ORDER and JUDGMENT holding the administration and application of 28D.2 of the rules of the South Dakota Department of Social Services in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and enjoining the Defendants, their agents, their employees, successors in interest, and all others acting in concert with them, from the enforcement or execution and application of Rule 28D.2 of the Rules of the South Dakota Department of Social Services so as to deny Plaintiff medicaid benefits covering the cost of her abortion.

October 3, 1974

Defendants-Appellants filed Notice of Appeal with the United States District Court for the District of South Dakota giving notice of appeal to the United States Supreme Court.

Defendants-Appellants filed a Motion For Stay of judgment Pending Appeal with the District Court.

November 30, 1974

Appeal was docketed with the United States Supreme Court as No. 74-684.

December 2, 1974

District Court enters Order denying Defendants'-Appellants' Motion For Stay of Judgment Pending Appeal.

December 11, 1974

Defendants-Appellants make Application For Stay of Judgment of the United States District Court For the District of South Dakota Western Division to the Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit.

December 19, 1974

Defendants'-Appellants' Application for Stay denied by Associate Justice Harry A. Blackmun.

January 9, 1975

Defendants-Appellants refer their Application for Stay to the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States.

March 17, 1975

Supreme Court vacated the judgment of the District Court and remanded the case to the District Court for further consideration in light of *Hagans* v. *Lavine*, 415 U.S. 528, 543-545 (1974).

March 31, 1975

Defendants file motion with United States District Court for the District of South Dakota Western Division to remand the case to the single district judge.

April 18, 1975

Order of Supreme Court vacating District Court's Judgment and remanding case for further consideration in light of *Hagans* v. *Lavine*, 415 U.S. 528, 543-545 (1974) filed with District Court.

Order of three-judge District Court entered directing parties to file supplemental briefs within 30 days directed solely to the question of whether the relevant state regulations violate 42 U.S.C. §1396, *et. seq.*

May 7, 1975

Defendants file motion to dismiss on the basis that the Social Security Act is not in the category of "any Act of Congress providing for equal rights of citizens or of all persons," *Acosta* v. *Swank*, 325 F-Supp. 1157 (D.C. N.D. Ill. 1971), and on the further basis that the case presents a political question of which the Constitutional Courts should not make a judicial determination.

September 29, 1975

Three-judge District Court enters its JUDGMENT declaring the South Dakota Department of Social Services Regulation 28D.210 to be violative of the requirements to Title XIX of the Social Security Act, and also in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Appellants filed a Notice of Appeal on October 20, 1975, with the United States District Court for the District of South Dakota Western Division giving notice of this Appeal to the

United States Supreme Court. Appellants also filed on October 20, 1975, a Motion For Stay of Judgment Pending Appeal with said District Court.

The Plaintiff-Appellee obtained an abortion from her physician on May 11, 1974. The bill has never been submitted to the Department of Social Services or any agency thereof.

THE QUESTION IS SUBSTANTIAL

Title 28 U.S.C. §1253 permits an appeal of the decision below as a matter of right since the court below consisted of a three-judge panel convened pursuant to 28 U.S.C. §2281, and said Court granted permanent injunctive relief involving state officers in the application of a state law of general and statewide application on constitutional and statutory grounds.

Cases sustaining the jurisdiction of the United States Supreme Court are:

1. *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969)
2. *Board of Regents of the University of Texas System* v. *New Left Education Project*, 404 U.S. 541 (1972)
3. *Bracher* v. *Fisher*, 49 F. 2d 759 (6th Cir. 1931)
4. *Ex Parte Collins*, 277 U.S. 565 (1928)
5. *Ex Parte Public National Bank of New York*, 278 U.S. 101 (1928)
6. *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963)
7. *Florida Lime and Avacado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960)
8. *Hagans* v. *Lavine*, 415 U.S. 528 (1974)

9. *Lee* v. *Rosenberry*, 200 F. 2d 155 (6th Cir. 1952)

10. *Moody* v. *Flowers*, 387 U.S. 97 (1967)

11. *Oklahoma Gas and Electric Company* v. *Oklahoma Packing Company*, 292 U.S. 386 (1926)

12. *Palmetto Fire Insurance Company* v. *Connecticut*, 272 U.S. 295 (1926)

13. *Pennsylvania Public Utility Commission* v. *Pennsylvania Railway Company*, 382 U.S. 281 (1965)

14. *Query* v. *United States*, 316 U.S. 486 (1942)

15. *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1963)

16. *Zemel* v. *Rusk*, 381 U.S. 1 (1965)

The issue presented here on appeal is substantial. The question of whether the State Department of Social Services must fund voluntary abortions is of vital concern to the State.

In addition, within the periphery of the central issue involved, this case presents a serious jurisdictional question, i.e. whether the judicial branch of government can render a ruling which vitiates the will of the people. Prior to the time that the Plaintiff-Appellee commenced this action, the South Dakota Department of Social Services was considering the adoption of a rule that would provide for the funding of voluntary abortions under the medical assistance program. However, in the aftermath of a public hearing held in March of 1974, at which hundreds upon hundreds of South Dakota residents voiced their views on the subject, it was determined by the Board of Social Services, that such a policy should not be adopted. This was so because the overwhelming majority of those expressing

themselves were vehemently opposed to using tax dollars for payment for voluntary abortions. Thus, Appellants respectfully submit that this case presents a question which is political, and not judicial, in nature, and hence is not a matter for the exercise of judicial power. *Colegrove* v. *Green*, 328 U.S. 549 (1946). Although the *Colegrove* case has been reversed, the doctrine enunciated therein remains valid.

CONFLICT AMONG FEDERAL COURTS OF APPEAL

There is a conflict between the Third and Sixth Circuits whether Title XIX of the Social Security Act requires payment for voluntary abortions. The Third Circuit has held that the states cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX – *Doe* v. *Beal*, No.'s 74-1716 and 74-1727 (filed July 21, 1975, 3rd Cir.) The Sixth Circuit has held that state regulations denying payment for non-therapeutic abortions do not violate Title XIX of the Social Security Act. *Roe* v. *Ferguson*, 515 F.2d 279 (6th Cir. 1975).

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court require briefs and oral argument on the issues presented, or in the alternative, to vacate the judgment of the lower court and remand the case with directions to dismiss.

Respectfully submitted,

WILLIAM J. JANKLOW
Attorney General of South Dakota

WILLIAM H. ENGBERG
Assistant Attorney General

Attorneys for Appellants

PROOF OF SERVICE

, Assistant Attorney General for South Dakota, a member of the Bar of the Supreme Court of the United States, certifies that copies of the JURISDICTIONAL STATEMENT of Appellants were served by first class mail, postage prepaid, upon Michael A. Wolff and Daniel L. Jackson of Black Hills Legal Services, Inc., 714 4th Street, Rapid City, South Dakota 57701; and Ms. Patricia Butler of National Health Law Program, 10995 Le Conte Avenue, Los Angeles, California 90024, Attorneys for Appellee, this day of December, 1975.

One of the Attorneys for
Appellants

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JANE DOE, on behalf of herself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL 74-5017
FRITHJOF O.M. WESTBY, individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, individually and as Director of the South Dakota Division of Social Welfare,	)	MEMORANDUM OF DECISION AND ORDER.
Defendants.	)	

Before ROSS, Circuit Judge, BENSON and BOGUE, District Judges.

BENSON, District Judge.

STATEMENT OF THE CASE

In this action, plaintiff seeks both declaratory and injunctive relief under 28 U.S.C. §1343(3) and (4), and §2201, 42 U.S.C.

§1983, and statutory relief under Title XIX of the Social Security Act of 1935, 42 U.S.C. §1396 *et seq.* She challenges as unconstitutional, and seeks to restrain, a policy promulgated by the Social Services Department of the State of South Dakota in its administration of Chapter 28 D.2 of the rules of the South Dakota Department of Social Services, which precludes Medicaid payments for abortions unless necessary to save the life or health of the mother. Upon this issue, and pursuant to 28 U.S.C. §2281, a three-judge court was designated to hear the case. She also alleges the regulations and policy violate the federal Medicaid Statutes, 42 U.S.C. §1396 *et seq.*

FINDINGS

There is no significant dispute between the parties on the facts. As enumerated in the Court's previous order,[1] the facts are:

1. At the time the complaint was filed, plaintiff, Jane Doe, was eight weeks pregnant and the unmarried mother of four children – ages ten, nine, eight, and four.[2] She was the recipient of Aid to Dependent Children under the federal-state program administered pursuant to the Social Security Act of 1935, 42 U.S.C. §601 *et seq.* She was also eligible for medical assistance (Medicaid) under Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*

2. A pregnancy is a condition which requires medical care.

3. In South Dakota the Medicaid program is administered by the Defendant Frithjof O.M. Westby, who, in his position as Secretary of Social Services, is by statute the head of the Department of Social Services. Included in the Department of Social Services is a Division of Social Welfare. The head of the division is Defendant Vern Woodard.[3] Plaintiff, in consultation with her physician, decided to terminate her pregnancy. Termination was not

"medically necessary", but was desired by the plaintiff because she felt she was unable to care for another child, and an abortion would be in her "best interest". She did not have the financial resources to pay for an abortion and was advised by the defendants, or their agents, through her attorney, that an elective abortion was not covered under the Medical Assistance Program and Medicaid would not pay for her abortion.

4. Rule 28D.210 of the South Dakota Department of Social Services provides:

> "Physician services not covered under the Medical Assistance Program are as follows:
>
> 1. Any items or services which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."

Pursuant to the foregoing rule, defendants will not extend Medicaid to cover payment for a nontherapeutic abortion for one otherwise qualified for Medicaid, but will authorize payment for an abortion when the claim is accompanied by a written medical report indicating that a therapeutic abortion is necessary.

5. Under the South Dakota program, a pregnant Medicaid recipient who chooses to carry her pregnancy to full term is given "any medical care that would be required in connection with the delivery of a child up to thirty days hospitalization of the mother and child and unlimited doctor care and services".

6. At about the twelve week point of her pregnancy, plaintiff

secured an abortion from her physican. Plaintiff remains indebted to the physician for his services.

On September 24, 1974, the three-judge court filed its Memorandum Decision and entered judgment for the plaintiff. In its decision, the panel examined only the constitutional issue presented by the plaintiff, whether "the policy being followed by the State of South Dakota in its administration of the medicaid program as it relates to pregnant women, otherwise qualified for medicaid, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States by discriminating between medicaid eligible women who carry their pregnancy to term, and medicaid eligible women who desire to terminate their pregnancy for nontherapeutic reasons, and thereby inhibits the one class in the exercise of a fundamental right." The Court did not consider the plaintiff's allegation that the State's policy violated Title XIX. The Supreme Court summarily vacated and remanded for consideration in light of *Hagans* v. *Lavine*, 415 U.S. 528 (1974).[4]

JURISDICTION

Following remand, defendants moved to dismiss the action for lack of jurisdiction. In denying the motion, this Court held:

> "It is clear that the Plaintiff's constitutional claim is of sufficient substance to support federal jurisdiction, and the requirement that the constitutional claim not be reached until the statutory claim has been considered does not divest this Court of jurisdiction in the matter."

Hagans v. *Lavine, supra*, states:

> "[T]he coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel, which, . . .

> could then merely pass the statutory claim back to the single judge." at 544.

In this case, the single-judge district court did defer to the three-judge panel which, after appropriate hearing, made its findings on the facts in the case. Additionally, both the statutory and constitutional issues have been fully argued to the three-judge court, and it has jurisdiction to consider the statutory claim. See *California Department of Human Resources* v. *Java*, 402 U.S. 121 (1971); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); and *King* v. *Smith*, 392 U.S. 309 (1968); in addition to *Hagans* v. *Lavine, supra*.

In the interest of judicial economy and efficiency, this three-judge court will proceed to consider the statutory claim.

STATUTORY CLAIM

Subsequent to the Supreme Court's mandate, the Third Circuit Court of Appeals considered *en banc* a case which presented an issue almost identical to the issue now before this Court. See *Doe* v. *Beal*, Nos. 74-1716 and 74-1727 (filed July 21, 1975, 3rd Cir.)[5] In *Beal*, a three-judge panel had first considered the statutory claim, but had decided the Pennsylvania procedures under its Medical Assistance Program restricting payments for abortions were consistent with Title XIX of the Social Security Act. *Doe* v. *Wohlgemuth*, 376 F.Supp. 173, 182-86 (W.D. Pa. 1974). They next considered the allegations of unconstitutionality and declared the procedures to be in violation of the Equal Protection Clause. *Doe* v. *Wohlgemuth* at 186-92. Both arguments were renewed on appeal.

The Court of Appeals proceeded with a comprehensive analysis of the Title XIX issue. In applying that analysis to the Pennsylvania regulations, the *Beal* Court found them inconsistent with the federal Act. It made the following conslusions:

"Applying the above analysis to the Pennsylvania regulations before us, we find them to be inconsistent with the Act. Since the Commonwealth of Pennsylvania pays for full-term deliveries and also for therapeutic abortions, it is plain that the state has determined, in its discretion, that pregnancy is a condition for which medical treatment is 'necessary' within the meaning of Title XIX. The next question is whether some justification can be found in the statute for preventing an attending physician from choosing non-therapeutic abortion as the method for treating a pregnancy. We can find none. Economy will not do, since in most cases non-therapeutic abortion is the cheapest method of treatment. See *Doe* v. *Rose, supra*, at 1116-17, citing *Klein* v. *Nassau Cty. Med. Ctr. supra* note 12; *Doe* v. *Wohlgemuth, supra*, at 187. Nor will protection of the recipient's health, under §1396a(a) (19) suffice; the state itself admitted at oral argument that non-therapeutic abortion is the least dangerous alternative for the pregnant woman, at lease during the first trimester. See *Roe* v. *Wade, supra* at 163. Not only are the state's abortion regulations not justified by any statutory policy, but they also run directly counter to §1396a(a) (10) (B) and (C), since the 'least voluntary method of treatment' requirement which the regulations impose on pregnant women is imposed on no other class of recipient. We therefore conclude that once the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX. Since the decisions of the Supreme Court have forced the states to include elective abortion in the legal practice of medicine through the second trimester of pregnancy, we also hold that the statute requires Pennsylvania to fund abortions through the end of the second trimester." *Doe* v. *Beal*, at 19-20.

We adopt the reasoning of the *Beal* Court, and hold that South Dakota, in extending medical aid for full term deliveries and also for therapeutic abortions, has determined, in its discretion, that pregnancy is a condition for which medical treatment is necessary within the meaning of Title XIX, and it cannot decline to finance nontherapeutic abortions without violating the requirements to Title XIX.

We further incorporate in this decision, by reference to the decision of this Court in *Doe* v. *Westby, supra*, the previous holding of this Court that the State of South Dakota, in providing Medicaid benefits to those eligible pregnant women who choose to carry their pregnancies to term and those who receive therapeutic abortions and deny Medicaid benefits to those eligible women who elect on the medical judgment of their physician a constitutionally protected nontherapeutic abortion as defined in *Roe* v. *Wade*, 410 U.S. 113 (1973), has created a classification which is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The plaintiff is entitled to Medicaid benefits covering the cost of her abortion.

The defendants, their agents, their employees, succesors in interest, and all others acting in concert with them, are enjoined from the enforcement or execution and application of Rule 28 D.2 of the Rules of the South Dakota Department of Social Services, or the statute under which such rule was promulgated, so as to deny the plaintiff Medicaid benefits covering the cost of her abortion.

It is assumed the State of South Dakota will give full credence to this decision, and that where Medicaid benefits are extended to Medicaid eligible pregnant women who elect to carry their pregnancy to term or who receive therapeutic abortions, Medicaid benefits will also be extended to Medicaid eligible pregnant women who elect, on the medical judgment of their physician, constitutionally protected nontherapeutic abortions.

IT IS ORDERED that judgment be entered accordingly.
Dated this 30th day of September, 1975.

DONALD R. ROSS
UNITED STATES CIRCUIT JUDGE

PAUL BENSON
UNITED STATES DISTRICT JUDGE

ANDREW W. BOGUE
UNITED STATES DISTRICT JUDGE

NOTICE OF ENTRY

The original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 29th day of September, 1974

/s/ William J. Sratka, Clerk

1 *Doe* v. *Westby*, 383 F.Supp. 1143 (D.S.S. 1974).

2 Plaintiff, who appears under an assumed name, was a married woman at the time of the birth of her children.

3. *See* South Dakota Compiled Laws Chapter 1-36.

4 The March 16, 1975, order of the Supreme Court, 420 U.S. 968, reads in part, "Judgment vacated and case remanded for further consideration in light of Hagans v. Lavine, 415 U.S. 528, 543-545 (1974)."

5. The case was an appeal of *Doe* v. *Wohlgemuth*, 376 F.Supp. 173 (W.D. Pa. 1974). The caption was changed to Doe v. Beal, pursuant to F.R.C.P. 25(a)(1), after the appeal had been docketed.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JANE DOE, on behalf of herself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIV 74-5017
FRITHJOF O.M. WESTBY, individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, individually and as Director of the South Dakota Division of Social Welfare,	)	
Defendants.	)	

JUDGMENT

Pursuant to the order for judgment entered in the above entitled matter this date,

IT IS ADJUDGED AND DECREED that in its administration and application of Rule 28D.2 of the Rules of the South Dakota Department of Social Services so as to provide Medicaid benefits to those eligible women who choose to carry their pregnancies to term and those who receive therapeutic

abortions, and deny Medicaid benefits to those eligible pregnant women who elect on the medical judgment of their physician, constitutionally protected nontherapeutic abortions as defined in *Roe* v. *Wade*, 410 U.S. 113 (1973), the State of South Dakota has violated Title XIX of the Social Security Act of 1935, 42 U.S.C. §1396 *et seq.*, and has created a classification which is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

IT IS FURTHER ADJUDGED AND DECREED that plaintiff herein is entitled to Medicaid benefits covering the cost of her abortion.

IT IS FURTHER ADJUDGED AND DECREED that the defendants, their agents, their employees, successors in interest, and all others acting in concert with them, are enjoined from the enforcement or execution and application of Rule 28D.2 of the Rules of the South Dakota Department of Social Services, or the statute under which such rule was promulgated, so as to deny the plaintiff Medicaid benefits covering the cost of her abortion.

Dated this 30th day of September, 1975.

DONALD R. ROSS
UNITED STATES CIRCUIT JUDGE

PAUL BENSON
UNITED STATES DISTRICT JUDGE

ANDREW W. BOGUE
UNITED STATES DISTRICT JUDGE

NOTICE OF ENTRY
The original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 29th day of September, 1974.

/s/ William J. Sratka, Clerk

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JANE DOE, on behalf of herself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIV 74-5017
FRITHJOF O.M. WESTBY, individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, individually and as Director of the South Dakota Division of Social Welfare,	)	
Defendants.	)	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the above named Defendants, Frithjof O.M. Westby, individually and as Secretary of the South Dakota Department of Social Services, and Vern Woodard, individually and as Director of the South Dakota Division of Social Welfare, hereby appeal to the United States Supreme Court from the final JUDGMENT in this action dated the 30th day of September, 1975, and filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 29th day of September, 1975.

The statute pursuant to which this appeal is taken is 28 USCA § 1253.

Dated this 16th day of October, 1975.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-813

FRITHJOF O. M. WESTBY, Individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, Individually and as Director of the South Dakota Division of Social Welfare,
Appellants,

v.

JANE DOE, on Behalf of Herself and All Others Similarly Situated,
Appellees.

On Appeal from the United States District Court for the District of South Dakota

MOTION TO AFFIRM

and

BRIEF IN SUPPORT OF MOTION

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January 5, 1976

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases:

United States Constitution:

Statutes and Regulations:

Secondary Authority:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-813

FRITHJOF O. M. WESTBY, Individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, Individually and as Director of the South Dakota Division of Social Welfare,
Appellants,

v.

JANE DOE, on Behalf of Herself and All Others Similarly Situated,
Appellees.

On Appeal from the United States District Court for the District of South Dakota

MOTION TO AFFIRM

Plaintiff-appellee Jane Doe moves this Court for its order summarily affirming the judgment of the three-judge district.

As grounds for such motion, and as more fully set forth in the brief herein, it is manifest that the questions on which

the decision of the cause depends are so unsubstantial as not to need further argument and, specifically, the district court's constitutional decision is fully controlled by recent unequivocal decisions of this Court.

Respectfully submitted,

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Attorneys for Appellee

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-813

FRITHJOF O. M. WESTBY, Individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, Individually and as Director of the South Dakota Division of Social Welfare,
Appellants,

v.

JANE DOE, on Behalf of Herself and All Others Similarly Situated,
Appellees.

On Appeal from the United States District Court for the District of South Dakota

BRIEF IN SUPPORT OF MOTION TO AFFIRM

I. QUESTIONS PRESENTED

A. Whether Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, under which defendant-appellants administer the federal-state Medicaid program in South Dakota, requires payment for lawful nontherapeutic abortions.

B. Whether the South Dakota Medicaid regulations, administered by defendant-appellants, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, where such regulations provide full payment for medical care for eligible pregnant women who carry their pregnancies to term or whose pregnancies are terminated for therapeutic reasons, and deny medical payments for eligible women who choose lawful nontherapeutic abortions.

II. STATEMENT OF THE CASE

A. Decision Below

On April 19, 1974, appellee Jane Doe commenced this action challenging the regulation and policy of the State of South Dakota that deny payment for lawful nontherapeutic abortions under the federal-state Medicaid program administered by defendant-appellants. Plaintiff-appellee asserted that the challenged regulation and policy violate Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.* (the federal Medicaid statute), and the equal protection clause of the Fourteenth Amendment.

The three-judge district court, convened pursuant to 28 U.S.C. 2281 *et seq.*, held that the regulation and policy administered by defendants violate the equal protection clause and entered judgment requiring, *inter alia*, that plaintiff's abortion be paid for under Medicaid. 383 F. Supp. 1143 (D. S.D. Sept. 24, 1974). On appeal by the defendants, Docket No. 74-684, this Court on March 17, 1975, vacated the judgment and remanded for further consideration in light of *Hagans v. Lavine*, 415 U.S. 528, 543-545 (1974), for adjudication of plaintiff's claim that the challenged regulation and policy violate the federal Medicaid statute, 42 U.S.C. 1396 *et seq.*; *Westby v. Doe*, 420 U.S. 968 (1975).

Upon remand, the three-judge district court gave consideration[1] to plaintiff-appellee's argument that the federal Medicaid statute requires payment for nontherapeutic abortions, and, relying upon *Doe v. Beal*, 523 F.2d 611 (3d Cir. 1975) (Petition for certiorari docketed, No. 75-554),[2] held that:

> . . . South Dakota, in extending medical aid for full term deliveries and also for therapeutic abortions, has determined, in its discretion, that pregnancy is a condition for which medical treatment is necessary within the meaning of Title XIX, and it cannot decline to finance nontherapeutic abortions without violating the requirements to Title XIX. *Doe v. Westby*, 402 F.Supp. 140, 143-144 (D.S.D. Sept. 29, 1975).

In addition, the three-judge court incorporated into its September 29, 1975 decision its earlier holding that:

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[1] Upon receiving the mandate of this Court, the three-judge court ordered the parties to submit further briefs on the statutory issue. In its September 29, 1975, Memorandum of Decision and Order, the three-judge court, "in the interest of judicial economy and efficiency," appropriately considered the statutory claim itself without further hearing rather than remanding the matter to the single judge. In doing so, the court noted that at the outset of the case, the single judge "did defer to the three-judge panel which, after appropriate hearing, made its findings on the facts in the case. Additionally, both the statutory and constitutional issues have been fully argued to the three-judge court, and it has jurisdiction to consider the statutory claim. See *California Department of Human Resources v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); and *King v. Smith*, 392 U.S. 309 (1968); in addition to *Hagans v. Lavine, supra.*" *Doe v. Westby*, 402 F.Supp. 140, 142 (D.S.D. Sept. 29, 1975).

[2] In *Beal v. Doe*, Supreme Court Docket No. 75-554, the Court of Appeals for the Third Circuit held that the Pennsylvania policy and regulation refusing payment for nontherapeutic abortions contravene the federal Medicaid statute. The court of appeals did not reach the constitutional issue. Thus the statutory issue presented in *Beal* is precisely the same as presented herein; however, the instant case, unlike *Beal*, also raises the constitutional issue since the district court's decision herein is based both on statutory and constitutional grounds.

> . . . the State of South Dakota, in providing Medicaid benefits to those eligible pregnant women who choose to carry their pregnancies to term and those who receive therapeutic abortions and deny Medicaid benefits to those eligible women who elect on the medical judgment of their physician a constitutionally protected nontherapeutic abortion as defined in *Roe v. Wade*, 410 U.S. 113 (1973), has created a classification which is in violation of the Equal Protection Clause of the Fourteenth Amendment . . . 402 F.Supp. at 144.

Thus, on both statutory and constitutional grounds, the district court entered judgment that plaintiff-appellee is entitled to Medicaid payment covering the cost of her nontherapeutic abortion and issued its injunction. From that judgment, defendants again appeal.

B. Facts.

The three-judge district court rendered its decisions upon cross-motions for summary judgment. The facts established by the record and found by the district court (383 F. Supp. at 1144-1145 and 402 F.Supp. 141-142) are:

> 1. At the time the complaint was filed, plaintiff, Jane Doe, was eight weeks pregnant and the unmarried mother of four children ages ten, nine, eight, and four.[3] She was the recipient of Aid to Dependent Children under the federal-state program administered pursuant to the Social Security Act of 1935, 42 U.S.C. § 601 *et seq*. She was also eligible for medical assistance (medicaid) under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*.

bered 3 and 4 herein.) Plaintiff, who appears under an assumed name, was a married woman at the time of the birth of her children.

[3] (The district court's footnotes, set forth in full, are renum-

2. A pregnancy is a condition which requires medical care.

3. In South Dakota the medicaid program is administered by the Defendant Frithjof O.M. Westby, who, in his position as Secretary of Social Services, is by statute the head of the Department of Social Services. Included in the Department of Social Services is a Division of Social Welfare. The head of the division is Defendant Vern Woodard.[4] Plaintiff in consultation with her physician, decided to terminate her pregnancy. Termination was not "medically necessary",[5] but was desired by the plaintiff because she felt she was unable to care for another child, and an abortion would be in her "best interest". She did not have the financial resources to pay for an abortion and was advised by the defendants, or their agents, through her attorney, that an elective abortion was not covered under the Medical Assistance Program and medicaid would not pay for her abortion.

4. Rule 28D.210 of the South Dakota Department of Social Services provides:

"Physician services not covered under the Medical Assistance Program are as follows:

> 1. Any items or services which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."

Pursuant to the foregoing rule, defendants will not extend medicaid to cover payment for a nontherapeutic abortion

[4] *See* South Dakota Compiled Laws Chapter 1-36.

[5] The district court also uses the term "nontherapeutic" to describe plaintiff's abortion; the defendants' regulations and policy deny payment unless the abortion is deemed to be "medically necessary," that is, necessary to preserve the life or health of the woman. See Plaintiff's Interrogatories to Defendants in the Record.

for one otherwise qualified for medicaid, but will authorize payment for an abortion when the claim is accompanied by a written medical report indicating that a therapeutic abortion is necessary.

5. Under the South Dakota program a pregnant medicaid recipient who chooses to carry her pregnancy to full term is given "any medical care that would be required in connection with the delivery of a child up to thirty days hospitalization of the mother and child and unlimited doctor care and services."

6. At about the twelve week point of her pregnancy, plaintiff secured an abortion from her physician. Plaintiff remains indebted to the physician for his services.

III. ARGUMENT

A. The Statutory Question Presented Is So Unsubstantial as Not to Require Further Argument Because the District Court Was Clearly Correct in Holding That the Federal Medicaid Statute Requires Payment for Nontherapeutic Abortions.

On the statutory claim, the question presented is precisely the same as in *Beal v. Doe, supra,* in which this Court on December 15, 1975, invited the Solicitor General to express the views of the United States as to whether or not Title XIX of the Social Security Act requires payment for nontherapeutic abortions. If the Pennsylvania welfare officials' petition for certiorari is denied in *Beal v. Doe,* then summary affirmance is appropriate in the appeal in the instant case.

The district court herein adopted the reasoning of the Court of Appeals for the Third Circuit in *Beal, supra,* which is based upon the well-accepted premise that pregnancy is a medical condition for which medical treatment is necessary. In examining the federal Medicaid statute,[6] the district court found that it does not authorize a state to refuse to pay for abortion because such a policy would not promote the statutory objectives: (1) to economize, 42 U.S.C. 1396a(a)(30), or (2) to protect the best interests of recipients, 42 U.S.C. 1396a(a)(19), since de-

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[6] The State of South Dakota participates in the federally-funded program of medical assistance to the indigent, "Medicaid," established by Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* All states participating in Medicaid must provide at least certain basic services [physician services, hospital services, nursing home services and X-ray and laboratory services, children's health screening and family planning services, 42 U.S.C. §§ 1396a(a)(13), 1396d(a)(1)-(5)] to at least all recipients of Aid to Families with Dependent Children, 42 U.S.C. § 601 *et seq.*, and Supplementary Security Income, 42 U.S.C. § 1381 *et seq.*, [42 U.S.C. § 1396a (a)(1)(A)]. The South Dakota Medicaid program, administered by defendants and their agents, provides medical assistance to the welfare recipient, which includes Plaintiff Jane Doe.

livery is often physically or psychologically more harmful to women than abortion. Moreover, the district court held that 42 U.S.C. 1396a(a)(10)(B) *requires* states to provide the same amount and scope of services to all classes of recipients. (402 F.Supp. at 143). Since the State of South Dakota does not impose upon other Medicaid recipients seeking medical care the requirement that they choose the "least voluntary method of treatment," it cannot impose this condition upon Medicaid recipients seeking to terminate their pregnancies by abortion.

Although two courts of appeals[7] have held that the Medicaid statute does not require payment for abortion, their reasoning is incorrect because: (1) it is based upon an incomplete analysis of the legislative history of the Medicaid statute and fails to consider the history of a recent amendment to the Act[8] in which Congress declined to prohibit payment for nontherapeutic abortions; and (2) it does not examine the section of the Medicaid statute[9] which the Third Circuit in *Beal* correctly held requires payment for abortion. The district court herein appropriately applied the Third Circuit's analysis. This case thus raises no substantial issues which require full argument before this Court and, accordingly, should be summarily affirmed.

B. **The Principles Upon Which the Constitutional Decision Below Is Based Are So Well Established That Further Argument Is Unnecessary.**

The three-judge district court herein, as noted, based its injunctive order both on the requirements of the federal Medicaid statute and on the Fourteenth Amendment, incorporating its

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[7] *Roe v. Norton*, 522 F.2d 928 (2d Cir. 1975) and *Roe v. Ferguson*, 515 F.2d 279 (6th Cir. 1975).

[8] 42 U.S.C. 1396d(a)(4)(c).

[9] 42 U.S.C. 1396a(a)(10).

earlier decision reported at 383 F.Supp. 1143. All courts squarely faced with the issue have decided that the Constitution prohibits states participating in Medicaid from refusing to pay for lawful nontherapeutic abortions where such states choose to pay for prenatal care and delivery.[10]

Even if this Court determines that the federal Medicaid statute does not require payment for abortion, the Court can affirm the district court's decision on constitutional grounds, since the constitutional principles involved are so well established that further argument is superfluous.

1. **Roe v. Wade and Doe v. Bolton control the decision in the instant case. The challenged regulation and policy clearly violate the equal protection clause.**

In *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), this Court interpreted the right of privacy to include a woman's decision, in consultation with her physician, whether or not to terminate her pregnancy by abortion. This Court held that the state could not interfere with a woman's constitutionally protected right to choose abortion, absent a compelling state interest, and found that in the first trimester of pregnancy no such interest exists, while in the second trimester the state has an interest only in protecting the woman's health. 410 U.S. 113, 163-164. In *Doe v. Bolton*, this Court also invalidated certain restrictions imposed by state law upon the decision made by the pregnant woman in consultation with her physician, including restriction of abortions to accredited

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[10] *Doe v. Rose*, 499 F.2d 1112 (10th Cir. 1974); *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974), *cert. granted*, 43 U.S. L.W. 3674 (1975); *Doe v. Rampton*, 366 F.Supp. 189 (D. Utah 1973); *Smith v. Tinder*, — F. Supp. — (D. W. Va. No. 75-0380CH, August 8, 1975) and *Doe v. Myatt*, (D. N.D. No. A3-74-48, January 27, 1975 and October 30, 1975).

hospitals, 410 U.S. at pp. 193-195, a requirement that abortion be approved by a hospital committee, 410 U.S. at pp. 196-198, and a requirement that two physicians concur in the abortion decision, 410 U.S. at pp. 198-199.

The court below held that once a state chooses to pay for medical services rendered in connection with the pregnancies of some Medicaid eligible women, it cannot refuse to pay for medical services rendered in connection with the pregnancies of other Medicaid eligible women who elect abortion, because the right to choose abortion involves a fundamental right, and the state can constitutionally discriminate between two similarly situated groups of pregnant Medicaid women only if it can produce a compelling state interest to do so. The district court correctly determined that the state has no such interest; as the court said:

> . . . (A)ll pregnancies must terminate. The policy reflects the moral judgment of the State that the pregnancies must terminate only by birth of a child or for therapeutic reasons. This moral judgment is not a compelling state interest which would justify inhibiting a woman in her exercise of a fundamental personal right as defined in *Roe* and *Doe*. 383 F. Supp. at 1146.

2. **Once the state chooses to provide medical care for pregnant women, it cannot place unconstitutional conditions upon the exercise of that entitlement.**

In the instant case, South Dakota has conditioned plaintiff's ability to receive Medicaid benefits during pregnancy—a statutory entitlement[11]—upon the decision not to terminate her pregnancy by abortion. Thus, the state would only allow plaintiff to receive medical care under Medicaid for her pregnancy

[11] 42 U.S.C. 1396 *et seq.*

if she forfeits her constitutional right to choose abortion. To receive any Medicaid services for pregnancy, she must carry it to term. While not absolutely prohibiting plaintiff and her class from receiving prenatal care or abortions financed from other sources, the Medicaid policy serves to deter and discourage pregnant Medicaid-eligible women from exercising their constitutionally protected choice.

The constitutional doctrine that a state may not condition receipt of statutory benefits upon forfeiture of constitutional rights is well established in a line of cases from *Sherbert v. Verner*, 374 U.S. 398 (1963). See also, *Perry v. Sinderman*, 408 U.S. 193 (1972); *Keyishian v. Board of Regents*. 385 U.S. 589 (1967); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Comment, Another Look at Unconstitutional Conditions*, 117 U.Pa.L.Rev. 144 (1968).

The analogy of the *Sherbert* and *Maricopa County* cases to the instant case is obvious and striking. In *Sherbert*, the plaintiff was required to forego her constitutional right to free exercise of religion in order to obtain statutory unemployment insurance benefits; in *Maricopa County*, the patients were required to abandon their constitutional right to travel in order to receive statutory medical services. Likewise, Plaintiff Jane Doe must forego her constitutional right to choose an abortion if she wishes to receive *any* medical care for her pregnancy. It is true that plaintiff is free to procure an abortion if she can afford to pay for it, just as Mrs. Verner was free to exercise her religion if she could afford to survive without unemployment insurance, or the patient in *Maricopa County* was free to travel if he could afford to pay for medical care. In *Maricopa County* this Court invalidated a residency requirement for medical care upon the remote and only possible deterrent effect which the state's denial of medical services might work upon the fundamental constitu-

tional right to travel, 94 S.Ct. at 1082.[12] In the instant case, defendants' policy of refusing to pay for abortion under Medicaid very clearly and very directly denies Plaintiff Jane Doe her freedom to choose an abortion, a constitutionally protected choice deriving from her fundamental right to privacy.

Plaintiff Jane Doe would again emphasize, as did this Court in the *Maricopa County* case, that the state is not required to provide any medical care for pregnant women. However, having once chosen to provide such care, the state cannot condition the receipt of its benefits upon the sacrifice of the woman's constitutionally protected right to choose the manner in which her pregnancy will terminate.

IV. CONCLUSION

The district court herein correctly applied established principles of statutory construction and constitutional analysis, and therefore this Court should affirm the judgment below without further argument. Even if this Court rejects the contention advanced here and in *Beal v. Doe, supra*, that the federal Medicaid statute requires payment for voluntary abortions, the constitutional basis for the decision below is so clearly correct that summary affirmance is appropriate. While each ground, statutory and constitutional, provides an independent basis for affirming the judgment in this case, the Court may prefer to affirm solely

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[12] The *Maricopa County* case is particularly significant to the case at bar in that it establishes that the right to obtain health care (even non-emergency health care) is a "basic necessity of life" to an indigent person. Programs providing health care benefits are essential, and of "greater constitutional significance" than other government benefit programs. Moreover, this Court rejected fiscal and administrative convenience arguments advanced by the State to justify the unconstitutional condition placed upon the receipt of such services.

on the statutory ground, and to deny the petition for certiorari in *Beal*, in order to avoid the constitutional question that would otherwise be presented.

Respectfully submitted,

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